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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-781

In the Matter of An Arbitration

between

COOK INDUSTRIES, INC., as Assignee of
RAG. LUIGI GANDINI VOGHERA,

Petitioner,

and

C. ITOH & CO. (AMERICA) INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COOK INDUSTRIES, INC., as Assignee of
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Petitioner,

against

C. ITOH & CO. (AMERICA) INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cook Industries, Inc., as Assignee of Rag. Luigi Gandini Voghera, prays that a Writ of Certiorari be issued to review the divided decision of the United States Court of Appeals for the Second Circuit (not yet reported, opinion annexed as Appendix A). This opinion affirmed a final order entered in the United States District Court for the Southern District of New York on October 28, 1970 (annexed as Appendix B).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. § 1254(1), 62 Stat. 928. The divided judgment of the Court of Appeals affirming the order of the District Court was entered on September 16, 1971, the appeal having been argued on the 7th day of June, 1971.

Question Presented

Did the lower courts, in dismissing the petition to vacate an arbitration award because the same was procured by "evident partiality" on the part of one of the arbitrators * effectively abolish the quasi-judicial standards for arbitrators conduct as set down by this Court in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 21 L. Ed. 2d 301, 89 S. Ct. 337 (1968).

Statute

The principal statute involved in this case is § 10 of the United States Arbitration Act, 9 U.S.C. (Arbitration Act) which is set forth verbatim:

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> "(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> "(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> "(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators".

* U.S. Arbitration Act 9 U.S.C. Section 10.

Statement

This is an action by the petitioner to vacate an arbitration award on the grounds that the award was procured by evident partiality on the part of one of the arbitrators (2a).* In 1969, petitioner contracted to buy 25,000 tons of a grain product, corn, from respondent (28a). Respondent failed to deliver and petitioner claimed damages in the amount of $168,970.46 (3a).

The purchase contract, a technical grain purchase agreement, contained the following arbitration clause:

> "ARBITRATION. Buyer and Seller agree to submit all disputes arising out of this contract to the Arbitration Committee of the New York Produce Exchange (or, if mutually agreed by the parties at the time arbitration is requested, to the Committee on Grain of the New York Produce Exchange) for adjudication, in accordance with its rules, and agrees to abide by the decision of the Committee." (28a)

The petitioner called for arbitration and requested, pursuant to the arbitration provision, that the hearing be held before the Committee on Grain rather than the Arbitration Committee. (29a) Respondent refused to proceed before the Grain Committee and insisted on the Arbitration Committee. (39a) It is significant that the disputed arbitrator is the only arbitrator versed in the grain industry on the Arbitration Committee whose other members were composed of brokers, accountants and importers. (4a, 30a) Equally important is the fact that the disputed arbitrator is not on the Grain Committee. (39a)

Prior to the arbitration proceedings, the disputed arbitrator failed to disclose substantial business dealings his firm had with respondent. (5a) This, despite the fact,

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* Reference is to the Appendix certified by the clerk of the Court of Appeals, unless otherwise stated.

that Section 8 of the rules of the New York Produce Exchange, provided as follows:

> "No person shall serve as an arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, unless the parties waive such disqualification in writing." (6a)

In July of 1970, an award was rendered rejecting petitioner's claim. (6a)

It is now uncontroverted that the most important customer of the disputed arbitrator's firm was the respondent. (37a) At the same time, the petitioner and the disputed arbitrator's employer are active and vigorous competitors. (37a) The disputed arbitrator personally handles 95 percent of his company's sales to Japan and his performance is gauged to these sales. (37a) On its own figures, respondent admits sales with the disputed arbitrator's firm in the year 1969 for $1,474,000.00 (32a) (petitioner estimates the sales of this firm and its related companies to be approximately $50,000,000.00 (27a)).

For 1970, the year the award was handed down, the respondent disingenuously advised that figures of its sales with the arbitrator's firm were unavailable. (32a) While petitioner admits that it knew of the relationship between respondent and the disputed arbitrator's employer, it did not know of the day to day relationship. (38a) More importantly, respondent has not contradicted the fact that at the time the arbitration was proceeding, important and current transactions were pending between respondent and the arbitrator's firm. (39a)*

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* The Court of Appeals in the majority opinion, incorrectly said that petitioner in an attempt to bring itself within the language of *Garfield & Co.* v. *Wiest*, 432 F. 2d 849 (2 Cir. 1970). Cert. denied 401 U.S. 940 (1971) alleged in its brief that extraordinary dealings were pending between respondents and the arbitrator's firm at the time of the arbitration. The fact is that this allegation was made in the supporting affidavits which were not geared to meet the test of *Garfield* (supra) since the affidavit was filed one month prior to the decision in *Garfield* (supra).

No disclosure was ever made by the arbitrator of any such dealings. (34a) It is impossible to ascertain apart from judicial proceedings the volume of these transactions as they are customarily trade secrets. (39a) (cf. Dissenting Opinion in Appendix A)

REASONS AND ARGUMENT FOR GRANTING CERTIORARI

The decision below not only is in conflict with the decision of this Court in Commonwealth Coatings Corp. v. Continental Casualty Co. (Supra) but also demolishes the standards for arbitral conduct as set down by this Court.

Shortly put, it is petitioner's position here that the Court of Appeals, by its divided decision, has effectively demolished the standards set down by this Court in *Commonwealth Coatings, Corp. v. Continental Casualty Co.* (supra), as to quasi-judicial norms of disclosure and conduct to be maintained by arbitrators. This matter is of great importance because of the vast and ever increasing volume of arbitrations taking place not only in commercial cases, but also in labor and maritime arbitrations.

This Court in *Commonwealth Coatings, Corp. v. Continental Casualty Co.*, (supra) attempted to put this matter to rest but its decision is apparently thwarted by the Court of Appeals.

Commonwealth Coatings, Corp. v. *Continental Casualty Co.* (supra) laid down a new hard and fast rule relating to the procedure to be followed by arbitrators in cases where an arbitrator has a business interest with one of the parties. Mr. Justice Fortas characterized the rule in his dissent (p. 307) as, "Until the decision today, it has not been the law that an arbitrator's failure to disclose a prior business relationship with one of the parties will compel the setting

aside of an arbitration award *regardless of the circumstances"* (emphasis added). Thus, it was the law then set down that an arbitrator is under an absolute duty to disclose his relationship with the party regardless of knowledge on the other party's part.

The unqualified nature of the duty was underscored by Mr. Justice White in his separate concurring opinion wherein he states: "but it is enough for present purposes to hold, as the court does, that where the arbitrator has a substantial interest in the firm which has done more than trivial business with the party that fact *must be* disclosed" (emphasis added). (p. 306)

The Court of Appeals made much of the fact that:

> "Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection."

Reliance for this principle was posited on the case of *Ilios Shipping & Trading Co., S.A.* v. *American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 700 (SDNY 1957) affd., per curiam 245 F. 2d 873 (2c Cir. 1957).

However, *Ilios* (supra) is no longer the law.

Mr. Justice Fortas in Footnone 1 of his dissent cites *Ilios* as support for his view that the former law was that a failure to disclose was not a ground for vacating an award.

Ilios had specifically held (page 700):

> "Where a party has knowledge of facts possibly indicating bias or impartiality on the part on an arbitration he cannot remain silent and later object to the award of the arbitrators on that ground."

Yet, the very case which was stated to be obsolete by Mr. Justice Fortas serves as the supporting authority for the Court of Appeals decision.

Indeed, the whole tenor of the decision in *Commonwealth Coatings, Corp.* v. *Continental Casualty Co.* (*supra*), evidences a clear-cut intent on the part of this Court to set down a new standard of conduct to be followed by arbitrators. In the main opinion (p. 305), the Court said "we can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias". Clearly, nothing could be easier than for an arbitrator to state at the inception of the proceedings what his relationship is to the parties before him.

Applying all of this to the present matter, it appears, first and foremost that the disputed arbitrator made no declaration whatsoever. This despite the fact petitioner was an active and daily competitor of his firm and the other party.

Sustenance for petitioner's Writ is found in the dissenting opinion of the Court of Appeals. There it was pointed out, that the arbitrator had flouted the rules of his own Committee in not disclosing his personal interest.*

In relying on *Ilios Shipping & Trading Co., S.A.* v. *American Anthrachite & Bituminous Coal Corp.* (*supra*), the dissent pointed out, the majority did not do "justice" to the Arbitration Act, the decision in *Commonwealth Coatings, Corp.* v. *Continental Casualty Co.* (*supra*) or to the parties (Appendix A).

Not knowing of the day to day transactions or any extraordinary transactions petitioner could not waive what

---

* This point as to the applicability of the New York Produce Exchange Rules is especially compelling since in *Commonwealth* (supra) the majority opinion cited similar rules of the American Arbitration Association as to disclosure by the arbitrator and waiver in writing "as highly significant" (p. 305). This, despite the fact that such rules were found to be not controlling (p. 305).

it didn't know. This argument impressed the dissenting Judge Oakes, as it had the New York Courts, in *Milliken Woolens* v. *Weber Knit Sportswear,* 11 App. Div. 2d 166, 202 N.Y.S. 2d 431. There, one of the arbitrators, a businessman responsible for buying textiles for an affiliate of his company, had for many years purchased a substantial part of his requirements from respondent or their affiliates. The court ordered the parties to proceed to a new arbitration noting that these transactions "may not be regarded as the casual and occasional dealing which might be expected where arbitrators are chosen because of familiarity with an industry."

A significant comment was made by that court as to trade arbitrators, waiver of disqualification and present dealings as follows:

> "With the development of arbitrations in commercial matters, particularly among persons in the same trade, arbitrators have been permitted to function who have had prior business dealings with one or both parties (Matter of *Atlantic Rayon Corp.* [Goldsmith], 277 App. Div. 554, 555). Hence, it has been held that mere proof of prior business relations with one party is insufficient to disqualify an arbitrator where that relationship is known to the opposing party (citations).
>
> "Thus knowledge, on the part of a party, of the existence of a disqualifying relationship between the opposition and an arbitrator coupled with a failure to make timely objection, will be deemed a waiver of the right to press the objection. Actual partiality, however, may not be deemed waived (Matter of *Miller* v. *Weinder,* 260 App. Div. 444).
>
> "Since waiver is a matter of intention (Matter of *City of Rochester,* 208 N.Y. 188, 197), the touchstone in these arbitration cases is the knowledge, actual or constructive, in the complaining party of the tained relationship or interest of the arbitrator. Thus, in Matter of *Dukraft Mfg. Co.* (*Bear Mill Mfg. Co.*) (22 Misc. 2d. 1057). McNally, J. set aside an award

> because no disclosure was made that business transactions between the arbitrator and one of the parties had increased considerably during the pendency of the arbitration proceedings."

In closing his vigorous dissent, Judge Oakes wrote:

> "I see no reason for the courts to write arbitrators a blank check, so to speak, of nondisclosure.
>
> "I would reverse and remand with instructions to the trial court to make findings as to the extent of the relationship between the arbitrator and Itoh and whether that relationship involved, at the time of the arbitration, dealings that were undisclosed and so substanial or so 'out of the ordinary course of business' as to have required, in fairness to the parties, disclosure or disqualification."

In the end, the dissent found a remarkable lack of candor displayed by the arbitrator's affidavit as well as respondent. He found that the majority had so turned around the *Commonwealth Coatings, Corp.* v. *Continental Casualty Co.* (*supra*) case as to amount to a "*carte blanche* for nondisclosure decried in *Commonwealth Coatings* (supra).

Conclusion

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue directed to the United States Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioner will ever pray.

COOK INDUSTRIES, INC.
By FRANCIS J. O'BRIEN
Attorney for Petitioner

FRANCIS J. O'BRIEN
of Counsel

APPENDIX A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 828—September Term 1970.

(Argued June 7, 1971 . Decided September 16, 1971.)

Docket No. 35790

In the Matter of an Arbitration between
COOK INDUSTRIES, INC., as assignee of
RAG. LUIGI GANDINI VOGHERA,

Petitioner-Appellant,

and

C. ITOH & CO. (AMERICA) INC.,

Respondent-Appellee.

Before:

FRIENDLY, *Chief Judge,*
HAYS and OAKES, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Edward C. McLean, *Judge,* denying appellant's motion, made pursuant to 9 U.S.C. § 10(b) (1964), to vacate an arbitrators' award.

Affirmed.

Appendix A

FRANCIS J. O'BRIEN, New York, N. Y. (Zock, Petrie, Sheneman & Reid, New York, N. Y., on the brief), *for Appellant.*

DAVID A. BOTWINIK, New York, N. Y. (Pavia & Harcourt, New York, N. Y., on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Southern District of New York which denied appellant's motion, made under 9 U:S.C. § 10(b) (1964), to vacate an arbitration award because of the alleged partiality of one of the arbitrators. We affirm.

Appellant is the assignee of Rag. Luigi Gandini Voghera, an Italian firm, which contracted to sell corn to the appellee. A dispute arose with respect to the performance of the contract, and appellant obtained an order of the district court directing the appellee to proceed to arbitration, as provided for in the sales contract, before the arbitration committee of the New York Produce Exchange. Although that committee normally consists of five persons, one was absent and the arbitration proceeded before the remaining four. One of the four arbitrators was Robert R. Anderson, an employee of Cargill Incorporated, the largest United States company in the grain trade. After the arbitrators had ruled unanimously in appellee's favor, appellant brought this action urging that there was "evident partiality" within the meaning of 9 U.S.C. § 10(b) (1964) and *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), because Anderson's employer, Cargill, had substantial business dealings with appellee, a circumstance which Anderson failed to disclose. We agree with the district court that appellant's position is without merit.

Appendix A

The record in the present case shows that Cargill, and both appellant and appellee, are corn dealers in an industry made up of comparatively few companies. Appellant as well as appellee has done business with Cargill. Many of appellant's employees are former employees of Cargill and knew of its dealings with the appellee. The district court was justified in concluding that appellant was fully aware at the time of the submission to arbitration of the relationship between appellee and Cargill.

Appellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first.

> "Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection. See San Carlo Opera Co. v. Conley, D.C.S.D.N.Y. 1946, 72 F. Supp. 825, 833, affirmed 2 Cir., 1947, 163 F.2d 310."

Ilios Shipping & Trading Corp. S.A. v. *American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698, 700 (S.D. N.Y.), aff'd per curiam, 245 F.2d 873 (2d Cir. 1957); see also *Garfield & Co.* v. *Weist*, 432 F.2d 849 (2d Cir. 1970), cert. denied, 401 U.S. 940 (1971).

Commonwealth Coatings, supra, is readily distinguishable. In that case "the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by [the] arbitrator, by the prime contractor, or by anyone else until after an award had been made." 393 U.S. at 146.

Moreover, while the Supreme Court in *Commonwealth Coatings* emphasized the importance of an arbitrator disclosing "to the parties any dealings that might create an

impression of possible bias", 393 U.S. at 149, this court, in giving practical meaning to that principle, has treated the obligation to which arbitrators are subject as being to disclose dealings of which the parties cannot reasonably be expected to be aware, i.e., dealings "not in the ordinary course of . . . business", *Garfield & Co. v. Wiest, supra,* at 854. In an attempt to bring itself within the scope of that language appellant alleges in its brief that "there were important and current transactions pending apart from the ordinary business conducted between [Cargill] and [appellee]." We find nothing in the record which suggests the existence of any extraordinary secret deal between appellee and Anderson's employer. Appellant had the burden of showing any such extraordinary dealings and failed to do so. We see no reason for affording it a second chance.

The order of the district court is affirmed.

OAKES, *Circuit Judge* (dissenting):

I dissent with deference and not without reluctance. Appellant Cook moved to vacate an arbitration award to appellee Itoh. The case was decided below on the basis of conflicting and ambiguous affidavits, with no evidence taken.

Section 8 of the Grain Arbitration Rules of the New York Produce Exchange required that

> No person shall serve as an arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, unless the parties waive such disqualification in writing.

No such waiver was signed here. The only grain member of the Arbitration Committee of that Exchange was an employee of Cargill Incorporated. Cargill's group of for-

eign companies known as the "Tradax Companies" sold approximately $50,000,000 of soya beans and feed grains in 1969 to appellee Itoh, a major Japanese grain importer. It now appears that Itoh is Cargill's most important grain customer in Japan. The arbitrator personally handles, according to appellant's affidavits, 95 per cent of his company's sales to Japan. Those affidavits aver that his performance is judged by Cargill on the basis of those sales. The arbitrator's own affidavit in opposition to the motion states that

> I have no connection with, and no interest in the operations of any company or subsidiary related to Cargill Inc. While the Tradax Companies may have done business with Itoh of Japan, such business is outside the sphere of my responsibilities.

At the very least, it seems to me, this raises an issue of fact which should be resolved by the taking of testimony, cross examination and findings below.

Beyond this, if we were to take the averments of the affidavits in the light most favorable to the appellant, the arbitrator, although he was but one of a committee of four, would appear to have had a "personal" interest under § 8 of the Grain Arbitration Rules, which required his disqualification in the absence, as here, of a written waiver. This is essentially the same rule—that an award should be set aside for an arbitrator's undisclosed pecuniary interest —that the Supreme Court read into the Federal Act, 9 U.S.C. §§ 1-14, in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), while pointing out that courts

> should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. 393 U.S. at 149.

Appendix A

The majority and appellee rely upon *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970), where the court held there was a waiver in advance by all member firms of the New York Stock Exchange of objections to arbitrators based on their dealings through specialists, at least as regards dealings in the ordinary course of Exchange business. 432 F.2d at 853-54. From this, the majority says, it follows that, since here Cook was aware that Cargill did business with Itoh and that the arbitrator in question was employed by Cargill, Cook must be deemed to have waived any disqualification. See also *Ilios Shipping & Trading Corp., S. A. v. American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698, 700 (S.D.N.Y.), *aff'd per curiam*, 245 F.2d 873 (2d Cir. 1957).

This view does not, I suggest, do justice to § 8 of the Grain Arbitration Rules, the U. S. Arbitration Act (9 U.S.C. § 10) authorizing the court to vacate and award where there is "evident partiality" on the arbitrator's part, the decision in *Commonwealth Coatings, supra*, or the parties in this case.

How are the parties to know in advance whether to waive unless there is full disclosure? How are they to know whether there are transactions "out of the ordinary course of business" unless pending transactions are disclosed? Even at this stage of the proceedings no one has any precise knowledge what matters were pending between Cargill/Tradax and Itoh and at the time of the arbitration. Commodity transactions, the affidavits tell us, generally are secret. "If arbitrators err on the side of disclosure, as they should," according to Mr. Justice White,[1] the salutary rule espoused by the majority may then be invoked against a party seeking the courts' aid to set aside an award.

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[1] Joined by Marshall, J., concurring in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150-52 (1968).

But here, even though the arbitrator filed an affidavit with the court in support of the award, the affidavit falls far short of disclosing just what is his relation with Itoh. He says, "While the Tradax Companies may have done business with Itoh of Japan, such business is outside the sphere of my responsibilities." Here surely is an unresolved question of fact. I see no reason for the courts to write arbitrators a blank check, so to speak, of nondisclosure.

I would reverse and remand with instructions to the trial court to make findings as to the extent of the relationship between the arbitrator and Itoh and whether that relationship involved, at the time of the arbitration, dealings that were undisclosed and so substantial or so "out of the ordinary course of business" as to have required, in fairness to the parties, disclosure or disqualification. While the burden of proof should rest on the party making the claim of partiality, *Saxis Steamship Co. v. Multifass International Traders, Inc.*, 375 F.2d. 577, 582 (2d Cir. 1967), the court is under an obligation to scan the record, to ascertain the facts, see *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962), which are here wholly in the air.

In short, I would not turn the doctrine of waiver restated in *Garfield, supra*, into a *carte blanche* for the nondisclosure decried in *Commonwealth Coatings, supra*.

APPENDIX B

(Opinion and Order of McLean, *D.J.*)

This is a motion to vacate an arbitrator's award pursuant to 9 U.S.C. § 10, which empowers the court to do so when the award was procured by "undue means", or when there was "evident partiality" on the part of any of the arbitrators. Petitioner claims that this section applies because one of the four arbitrators, Robert R. Anderson, did not disclose that his employer, Cargill Incorporated, had substantial business dealings with respondent.

The four arbitrators were unanimous in deciding in Itoh's favor. There is no claim that Anderson in fact was prejudiced. Petitioner asserts, however, that this application must be granted on the strength of the rule laid down in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). In my opinion, the factual situation revealed by the affidavits on this motion is distinguishable from that in *Commonwealth* and is more nearly akin to that in *Garfield & Co.* v. *West*, Docket No. 34552 (2d Cir. October 20, 1970) which held that Commonwealth was not controlling.

The Petitioner is the assignee of Rag. Luigi Gandini Voghera, an Italian firm which had a contract to sell corn to respondent. A dispute arose out of respondent's alleged non performance of that contract. The contract provided that all disputes arising out of it should be arbitrated before the Arbitration Committee of the New York Produce Exchange. The Arbitration Committee consists of five persons. One of them was unavailable, hence the arbitration proceeded before the other four.

Cargill, Anderson's employer, is a corn dealer, as are both petitioner and respondent. It is well known that the comparatively few companies in this business have many dealings with one another. Cargill had dealings with respondent and also with petitioner. Petitioner was aware of

that fact. Indeed, several of its employees were formerly employees of Cargill and knew that Cargill dealt with respondent. Petitioner, despite this knowledge, did not challenge Anderson's impartiality until after it had lost the arbitration.

Anderson himself had no pecuniary interest in these transactions. He was merely an employee of Cargill. This fact alone may well distinguish this case from *Commonwealth,* where one of the arbitrators had personally done work for and received fee from one of the parties to the arbitration. I do not place my decision on this ground, however, but upon the broader ground set forth in *Garfield,* in which the court stated (p. 120):

"In this opinion, we are only holding that, when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties, disclosure of these dealings is not required by *Commonwealth Coatings* inasmuch as the parties are deemed to have waived any objections based on these dealings".

The motion is denied.

So ordered.

Dated: October 28, 1970

/s/ Edward C. McLean
U.S.D.J.

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OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

1. Does *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968) require the vacation of an arbitration award if one of the arbitrators does not disclose on the record ordinary business dealings with one party when the other party to the arbitration had prior knowledge of those dealings and did not raise an objection?

2. If *Commonwealth Coatings, supra,* does not require dismissal, should this Court grant certiorari to review a

factual determination that there were no extraordinary dealings which were required to be revealed by the arbitrator?

Statement

Petitioner, the unsuccessful party in an arbitration before the Arbitration Committee of the New York Produce Exchange, brought the proceeding below in an attempt to set aside the award on the ground that Robert R. Anderson, one of the four members of the arbitration committee who heard the case, failed to reveal that his employer (Cargill, Inc.) had substantial business dealings with respondent.

During the course of the arbitration, neither party felt it necessary to question the arbitrators about possible dealings with the parties, and the arbitrators did not feel it necessary to reveal such dealings (34a). Both parties knew that such dealings existed. Robert Anderson especially was known to both parties (34a). His employer, Cargill, Inc., is the largest United States company in the grain trade, and has had dealings with both respondent and petitioner. Indeed, petitioner's grain department was largely made up of Cargill alumni. John Finlayson, who was present throughout the arbitration hearings, William Adams, who submitted an affidavit in support of the motion, and Philip McCaull who was in charge of the department, previously were employed by Cargill and had full personal knowledge of Cargill's dealings with respondent (34a). The respondent made no secret of its dealings with Cargill since Naohiro Minami, the Manager of respondent's Grain Department, testified that respondent dealt with Cargill (36a).

Cook was aware of the dealings between Cargill and Itoh, not only through Cargill's former employees, but also through the daily exchange of information, which is part and parcel of the commodities business (31a). The small

number of companies actively engaged in the grain business deal with each other continually, and exchange details of purchasers and sales regularly (31a).

Despite the petitioner's admitted prior knowledge of the dealings between Cargill and respondent, petitioner argued that Mr. Anderson's failure to disclose the relationship on the record raised an implication of partiality sufficient to justify vacation of the award under § 10 of the Federal Arbitration Act, 9 U.S.C. 10. Respondent argued that petitioner had full knowledge that respondent did business with Cargill, Inc. and that petitioner's participation in the arbitration without objection constituted a waiver of any claim.

Judge McLean of the United States District Court distinguished this case from Commonwealth Coatings, *supra*. He pointed out that the fact that Mr. Anderson was merely an employee of Cargill, Inc. with no pecuniary interest in its transactions created a situation different from the one presented in Commonwealth Coatings, *supra*, where one of the arbitrators had personally done work for and received fees from a party to the arbitration. Rather than rest his decision on that narrow ground, however, Judge McLean relied on *Garfield & Co.* v. *Weist*, 432 F. 2d 849 (2nd Cir. 1970), Cert. denied 401 U.S. 940 (1971), where the Court said:

> ". . . In this opinion we are only holding that, when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties, disclosure of these dealings is not required by *Commonwealth Coatings* inasmuch as the parties are deemed to have waived any objections based on these dealings."

On appeal, the petitioner repeated its *Commonwealth Coatings*-related arguments and attempted to fit itself into an exception stated by the Court of Appeals in the *Garfield*

case by arguing that there were transactions out of the ordinary course of business of which petitioner was unaware.

The Court of Appeals affirmed Judge McLean's decision. The majority of the Court found *Commonwealth Coatings* readily distinguishable since in that case the facts relating to the business relationship were unknown to the petitioner, while in this case: "The district court was justified in concluding that appellant was fully aware at the time of the submission to arbitration of the relationship between appellee and Cargill."

The majority also found that there was nothing in the record to support petitioner's claim of extraordinary dealings between respondent and Cargill.

The dissenting judge did not quarrel with the legal conclusion of the majority. His disagreement was based on his opinion that the affidavits had raised questions of fact which should be resolved by a hearing.

POINT I

The decision below is not in conflict with the decision of this Court in the *Commonwealth Coatings* case, *supra*.

The petitioner argues on pages 5 and 6 of the petition, that the *Commonwealth Coatings* case creates an absolute duty on the part of an arbitrator to disclose his relationship with a party to the arbitration regardless of knowledge of the relationship by the other party, and that the decision of the Court below conflicts with *Commonwealth* because the Court of Appeals held that formal disclosure was unnecessary where there was prior knowledge.

While respondent believes that the word "disclosure" is broad enough to encompass prior knowledge, there is no need to rely on a definition of the word. The decision in

Commonwealth, supra, makes it clear that this Court intended only to condemn participation by an arbitrator whose relationship with one of the parties was unknown to the other party. The decision rested on the underlying statement that:

> "... the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by [the] arbitrator, by the prime contractor, or by anyone else until after an an award had been made." 393 U.S. at 146.

In addition, this Court, in analogizing the situation to one involving a judge or foreman of a jury, stated:

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, *unknown to the litigant*, any such relationship, the judgment would be subject to challenge." (emphasis supplied) 393 U.S. at 148.

The Court of Appeals correctly interpreted *Commonwealth Coatings*. A holding that that case required arbitrators to spread on the record information known to both sides would have been a misinterpretation of the purpose and intent of this Court.

POINT II

I.

The difference of opinion between the majority and the minority in the Court below as to whether the affidavits raised a question of fact which should be resolved by a hearing is not a reason for granting certiorari.

Since, as has been demonstrated in Point I, *Commonwealth Coatings, supra*, requires disclosure on the record only if the facts of a relationship between a party and an arbitrator are unknown to the other party, and since the

business relationship between respondent and Cargill was known to petitioner, the only question raised in the successive appeals from the award concerned the alleged extraordinary dealings between respondent and Cargill which were unknown to the petitioner.

The majority of the Court below held that the petitioner had "the burden of showing any such extraordinary dealings and failed to do so." The dissenting judge argued that the affidavits had raised sufficient questions to warrant a hearing.

On the basis of the record before the Court, the majority's conclusion was clearly correct. The petitioner's affidavits contain no claim or proof of any extraordinary dealings between Cargill and respondent.

Even if the majority had erred, however, such error would provide no reason for granting certiorari. There is no special or important reason for this Court to review an essential factual determination.

CONCLUSION

The present case is not a proper one for review by this Court. The petition for certiorari should therefore be denied.

Respectfully submitted,

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